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Supreme Court of the United States

OCTOBER TERM, 1968

No. 740

STANDARD FRUIT AND STEAMSHIP COMPANY,
Appellant

versus

UNITED FRUIT COMPANY
and
UNITED STATES OF AMERICA,
Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

OCTOBER TERM, 1968

No.

STANDARD FRUIT AND STEAMSHIP COMPANY,
Appellant

versus

UNITED FRUIT COMPANY
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Appellees

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the District Court, which has not been reported, is embodied in his order at issue, a copy of which is appended hereto at page 15 below.

Jurisdiction

A civil Government antitrust action, brought under the Sherman Act (15 USC §§1 and 2) and the Wilson Tariff Act (15 USC §8), in which appellant's dominant competitor is the defendant and to which appellant is not a party, resulted in a consent decree of divestiture. The defendant is required to file periodic programs and progress reports showing the steps it is taking to establish a new company as provided by the decree. The District Court signed a

protective order under Rule 30b, Federal Rules of Civil Procedure, sealing from public inspection all documents filed by the parties. Appellant filed a motion for leave to inspect and copy the programs and progress reports filed by the defendant.

This appeal is taken from the order denying appellant's motion. The order is dated August 14, 1968 and was entered on August 21, 1968. The notice of appeal was filed on August 30, 1968 in the United States District Court for the Eastern District of Louisiana.

The Expediting Act (15 USC §29) provides for direct appeal to this Court from final judgments in civil Government antitrust actions. Since the order appealed from settles the entire controversy between appellant and the other parties, it is a final judgment for the purpose of appeal. *Clark vs Williard,* 292 US 112, 118 (1934); and see *Cohen vs Beneficial Loan Corp.*, 337 US 541, 546 (1949); *Swift & Co. vs Compania Caribe,* 339 US 684, 688-89 (1950); *Missouri-Kansas Pipe Line Co. vs United States,* 312 US 502 (1941).

This Court has held that the appeal is to the Court of Appeals in such a case when "the controversy which is disposed of by the District Court's order is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned." *Shenandoah Valley Broadcasting, Inc. vs ASCAP,* 375 US 39, 40 (1963).

The *Shenandoah* rule has been held applicable to a motion, to rescind a protective order sealing part of the record in a Government antitrust suit which had been terminated by consent decree, ancillary to an attempt to obtain the same documents by subpoena in a subsequent private suit. *Olympic Refining Co. vs Carter,* 332 F2d 260 (CA 9-1964), cert. den., 379 US 900.

It is submitted that the *Shenandoah* and *Olympic* cases are distinguishable from this one, in which the antitrust action was not terminated by the consent decree but is still continuing as the defendant proceeds with compliance, and so far from appellant's motion being "entirely between private parties", or lying "outside the mainstream of the litigation in which the Government is directly concerned", the Government actively supported, briefed and argued the motion, and expressed strong interest in having it granted to afford the Government the benefit of appellant's views as to the defendant's compliance plans and activities. This case is nearer to *Cascade Natural Gas Corporation vs El Paso Natural Gas Co.,* 386 US 129 (1967), and *Missouri-Kansas Pipe Line Co. vs United States,* 312 US 502 (1941) (appeals from denial of post-decree intervention), and *Terminal RR Ass'n vs United States,* 266 US 17 (1924) (appeal from judgment of contempt for violation of decree).

Question Presented

Whether, in a civil antitrust action brought by the United States against the dominant company in its

industry and terminated by a consent decree (*inter alia*) of divestiture, the detailed programs and progress reports filed with the Court by the defendant, showing the steps it is taking to organize and establish a new company from its own assets pursuant to the decree, should be sealed from public disclosure, and from access by the defendant's smaller competitors whom the decree was presumably intended to protect and benefit.

Statement of the Case

In 1954 the United States commenced this civil antitrust action against appellee United Fruit Company. As appears from paragraphs 3-49 of the amended complaint and the portions thereof admitted in the answer, United dominates the banana industry in this country, a position it achieved by a series of acquisitions beginning in 1899.

In 1958, a consent decree was entered prior to trial. United was enjoined from a long list of antitrust violations (articles IV-VI), and, in addition to divestiture of a Central American railroad (article VII), was ordered to create, from its own assets, a new banana company having a specified banana-importation capacity (article VIII). The decree called for filing by United, in 1966 (later extended to 1967), of a plan for compliance with its obligation to create the new company (article VIII-E).

Shortly after entry of the decree, the District Court granted United's motion for a protective order under Rule 30b, Federal Rules of Civil Procedure,

prohibiting inspection by outsiders of documents produced pursuant to discovery, of answers to interrogatories, or of "any document submitted by either party in this case".

The plan for compliance, approved by the District Court on July 28, 1967, required United to submit to the Court (a) within one year thereafter, a detailed program for the initial organization, staffing, production, shipping, marketing and other arrangements for the new company; (b) within another year, a detailed program showing the shipping and terminal arrangements and other assets transferred to the new company by United to enable it to have the specified banana-importation capacity; and (c) within 90 days after approval of the plan, and every 60 days thereafter, a detailed report of its progress toward compliance with the plan, the programs and the decree.

Appellant, as a smaller competitor of United, has a vital interest in seeing the programs and progress reports filed by United pursuant to the plan of compliance. At appellant's request, the Government wrote to the Clerk of Court in April 1968, asking him to permit interested persons to inspect and copy these programs and reports as public records (Exhibit A to appellant's motion for leave to inspect the programs and reports). Appellant then applied to the Clerk for access to these documents; but after consulting with United's counsel, the Clerk advised appellant that the programs and reports are, in his

opinion, sealed by the protective order entered in 1958 (Exhibits B and C to appellant's motion).

Appellant then filed a verified motion in the anti-trust action for leave to inspect and copy the programs and reports. The motion set forth appellant's interest therein as a smaller competitor of United, and pointed out that although the decree appears to contemplate that United would create the new company from its own organization, the new company had already hired away the Manager of appellant's Steamship Department. At the hearing of its motion, appellant filed in evidence a letter indicating that contrary to the decree's provision that United provide, from its own assets, terminal facilities for the new company in this country, efforts are afoot to have such facilities carved out of those of appellant (Exhibit D).

Neither the Government nor United challenged appellant's standing to file this motion. At the hearing thereof, the United States filed a brief and presented oral argument in support of the motion, on the grounds that "reports and detailed plans filed with the Court in divestiture proceedings should be open for public inspection in order to give the Court and the Government the benefit of the informed judgment of all those concerned with the affected industry as to the adequacy of the steps being taken by United and in order to advise potential purchasers and investors of the nature and prospects of the new company"; that "the experience of the Department

of Justice in handling many divestiture cases indicates the desirability of such informed outside judgments on such issues as the suitability of properties and assets being transferred to the divested company"; that "these outsiders cannot be well informed if the basic data is kept secret"; that "there is a traditional common law policy in favor of open court proceedings in order to reassure the public as to the effectiveness of judicial administration"; and that "United, by far the largest competitor Sovereign (the new company) must face, already knows all this allegedly confidential information in far greater detail than a competitor could possibly learn by reading the reports".

In opposition to the motion, United filed affidavits to the effect that the new company "has not been guilty of raiding Standard's organization", but that its employment of appellant's Steamship Manager had been arranged through the suggestion and go-between offices of an anonymous mutual friend of his and of the new company's president. The affidavits also stated that appellant, if allowed to see the programs and reports, would be enabled to take various steps to prepare itself to meet the new company's competition more effectively.

At the conclusion of argument, the District Court denied the motion. Its formal opinion-order holds that the 1958 protective order extends to the programs and reports at issue, and that United's smaller competitors should be denied access thereto in order to protect the new company from any adverse effects

of knowledge thereof by its (the new company's) competitors, especially since the Court is powerless to compel comparable disclosure by the smaller competitors of their affairs to the new company. In its oral remarks, the Court commented that while it might seem anomalous that United, the dominant company, should have knowledge of the programs and reports to the exclusion of its smaller competitors, this situation is not of United's making.

The Question is Substantial

The question of closing court records and proceedings from public scrutiny is of such public importance, even in private litigation, that this Court has already exercised its power to direct mandamus to a District Court to reverse such an order in such a case. *Ex parte Uppercu*, 239 US 435 (1915).[1]

[1] And see *Bell vs Commonwealth Title Ins. Co.*, 189 US 131 (1903); *Miller vs Moise*, 168 Fed. 940 (CC Pa.-1909); *Sloan Filter Co. vs El Paso Reduction Co.*, 117 Fed. 504, 506-7 (CC Colo.-1902) ("If strangers to the suit can be in any manner or to any extent bound by the result, they ought to be at liberty to inquire how the controversy is carried on. . . . These cases and others support the common-law rule that a party may have inspection of any document or paper in which he may be interested"), quoted with approval in *In re Greenbaum*, 243 Fed. 965, 969 (ED Mich.-1917); and other decisions collected at 175 ALR 1260. The open-record rule is simply one facet of the general principle of "sound public policy to avoid secret judicial proceedings in the course of trial so far as possible". *United States vs Consolidated Laundries Corporation*, 266 F2d 941, 942 (CA 2-1959). The few cases in which closure orders have been sustained have involved discovery material covered by Civil Rule 30b, or related affidavits ordered sealed temporarily pending trial or hearing of a motion. See *International Products Corp. vs Koons*, 325 F2d 403 (CA 2-1963), *Parker vs Columbia Broadcasting System*, 320 F2d 937 (CA 2-1963), and *Baim & Blank, Inc. vs Bruno-New York, Inc.*, 17 FRD 346 (SD NY-1955), the only cases cited in United's brief to the District Court.

The seriousness of a closure order is greatly amplified when entered in a Government antitrust suit which, unlike a private action, is brought in the public interest, and affects, not merely the interests of the particular defendant, but those of all of its competitors and of the consuming public generally.

The Publicity in Taking Evidence Act, while referring in terms only to depositions,[2] is expressive of a broad congressional policy of open records and proceedings in public antitrust actions, especially those ending in consent decrees. *Olympic Refining Co. vs Carter,* 332 F2d 260, 264 (CA 9-1964), cert. den., 279 US 900; and see the excerpts from the congressional debates and committee report at page 17 below, and Report of the Antitrust Subcommittee of the House Judiciary Committee, on the Consent Decree Program (1959), 25: "The element of secrecy that surrounds the entire consent-decree program is contrary to the general policy established by Congress, that antitrust enforcement proceedings shall be public."

This Court has recognized the public benefit from exposure of antitrust compliance procedures to the informed study and comments of those affected thereby, by laying down liberal intervention rules in *Cascade*

[2] "In the taking of depositions of witnesses for use in any suit in equity brought by the United States under sections 1-7 of this title, and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable." 15 USC §30.

Natural Gas Corporation vs El Paso Natural Gas Co., 386 US 129 (1967); and see *Missouri-Kansas Pipe Line Co. vs United States*, 312 US 502, 506 (1941). This public interest is closely akin to that "in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action." *Lawlor vs National Screen Service*, 349 US 322, 329 (1955).

The United States has espoused the same principle in its statement of official policy of encouragement of all interested persons to make known their views as to proposed consent decrees, prior to approval thereof by the Department of Justice. 28 CFR §50.1. And, as stated by the Department in its brief in the District Court in this case, "these outsiders cannot be well informed if the basic data is kept secret."

The extraordinary complexity of the banana-import business—involving the cultivation of fragile plants, peculiarly subject to hazards of weather and disease, on selected acreages in tropical countries of uncertain economic and political stability, rapid transportation of a delicate and perishable product in expensive specially-constructed refrigerated vessels, ripening of the green-cut fruit in special storage facilities after discharge, and sale thereof in a volatile market having no controllable relationship to the availability of the fruit, which must either be cut, transported, ripened and sold on a fixed schedule, or lost entirely—appears from the pleadings herein (amended complaint, article III, answer, articles III-XX).

These facts explain why the Government is so anxious to obtain expert assistance in evaluating the viability of United's plans for establishment of a new company to compete in this multi-risk field of endeavor, and in making sure that the new company is being fashioned as a shield for the smaller companies against United, rather than as a weapon for use by United against them.

United opposed appellant's motion below on the ground that "acceptance of a consent judgment by an antitrust defendant should not be used to subject a defendant to further exploration and annoyance by private parties, or to promote or support attacks by them concerning sensitive information relative to defendant's business operations contained in . . . documents filed with the Clerk of this Court pursuant to the consent judgment", and that "the allowance of examination of these materials by a competitor of United in this case would be inconsistent with the very real public interest in the use of consent judgments as the principal means of disposing of antitrust litigation."

This contention, which is unsupported by authority and was not accepted by the District Court, is unfounded and dangerous. There should be no public policy of secrecy surrounding antitrust litigation terminated by a consent decree negotiated between the defendant and the Government. To the contrary, these, above all other cases, should be exposed to the light of publicity to assure that the public interest really is being served. *Cf.* Report of the Antitrust Subcommittee of the House Judiciary Committee, on the Consent Decree Program

(1959), x-xiii, 12-18, 22-26; *Olympic Refining Co. vs Carter*, 332 F2d 260, 264-65 (CA 9-1964), cert. den., 379 US 900. This is particularly true inasmuch as entry of a consent decree, by foreclosing the monopolist's victims from the private-suit *prima-facie* evidentiary effect of a judgment for the Government after trial (15 USC §16(a) proviso), confers on the defendant "substantial immunity from private antitrust actions". Report of the Antitrust Subcommittee of the House Judiciary Committee, on the Consent Decree Program (1959), 23.

United argued, and the District Court held, that the programs and progress reports should be sealed because appellant and United's other smaller competitors would otherwise be enabled to prepare to take unfair competitive advantage of the new company. This accusation against smaller companies which have never been accused of unfair competition, by a giant monopolist which has been the object of more than one antitrust action,[3] seems more than a little disingenuous.

The smaller companies, whom the consent decree was designed to protect, have at least as much interest as United in assuring the success rather than the failure of the new company. More fundamentally, why should the monopolist, whose antitrust violations the decree

[3] In addition to the action here at issue, see paragraph 44 of the amended complaint, and *Bluefields SS Co. vs United Fruit Co.*, 243 Fed. 1 (CA 3-1917), error dis., 248 US 595; *Banana Service Co. vs United Fruit Co.*, 15 FRD 106 (DC Mass.-1953); *Sanib Corp. vs United Fruit Co.*, 135 FS 764 (SD NY-1955); *Banana Distributors, Inc. vs United Fruit Co.*, 269 F2d 790 (CA 2-1959); *United Banana Co. vs United Fruit Co.*, 362 F2d 849 (CA 2-1966); *International Railways vs United Fruit Co.*, 373 F2d 408 (CA 2-1967), cert. den., 387 US 921.

was intended to remedy, have not only control over the new company's organization and establishment, with power to cause it to act to the detriment of its smaller competitors, but also the privilege of keeping secret its plans for the new company, thereby both compounding its competitive advantage and inhibiting the protests by the smaller companies which it is in the public interest to encourage?

The District Court's disregard of this anomaly on the premise that the situation is not of United's making, overlooks the fact both that the antitrust action was occasioned by United's own wrongful and anti-competitive acts, and that the creation of the new company, and United's obligations to file progress reports, stem from its voluntary election to forgo a trial on the merits in favor of a consent decree.

The Court's reluctance to permit appellant to inspect the programs and reports absent any power to order appellant to disclose its affairs to the new company, overlooks the fact that appellant is an established company whose operations are well known in the industry, and that the new company has employed one of appellant's key executives who is under neither a legal nor a moral obligation (and would psychologically be unable) to discharge his duties to the new company in disregard of his intimate knowledge of appellant's business.

Conclusion

For these reasons, it is respectfully submitted that the question presented is so substantial as to require plenary consideration for resolution thereof.

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October, 1968

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
New Orleans Division

Civil Action No. 4560

UNITED STATES OF AMERICA,
Plaintiff,

v.

UNITED FRUIT COMPANY,
Defendant.

ORDER

The motion of Standard Fruit & Steamship Company for an order permitting it to inspect and copy reports and programs submitted by defendant United Fruit Company to this Court relating to the proposed plans, practices and policies of Sovereign Fruit Company as well as any other portions of the record in this proceeding came on for hearing before this Court on August 1, 1968. The Court, having heard oral argument and having considered the briefs and affidavits filed by the parties, now finds: (1) That the considerations that led the Court to restrict inspection and copying of documents produced pursuant to pretrial discovery and of answers to interrogatories continue to exist; (2) That the reports and programs relating to Sovereign Fruit Company filed and hereafter to be filed contain and will contain confidential commercial information relating to the proposed operations of that company after its stock has been divested by United Fruit Company; (3) That dis-

closure of this information to Standard Fruit & Steamship Company will give it a competitive advantage; (4) That this Court has no jurisdiction or authority to require Standard Fruit & Steamship Company to supply either United Fruit Company or Sovereign Fruit Company with comparable competitive information relating to the commercial activities of Standard Fruit & Steamship Company; and (5) That the purposes of the Final Judgment and the public interest will not now be served by granting the motion of Standard Fruit & Steamship Company.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion of Standard Fruit & Steamship Company shall be and hereby is denied, without prejudice to the right of Standard Fruit & Steamship Company or the plaintiff herein to make hereafter the same or a similar motion.

Done this 14th day of August, 1968.

/S./ SEYBOURN H. LYNNE,
Judge.

Excerpts from the Congressional Debates and Committee Report on the Publicity in Taking Evidence Act, Senate Bill 8000, 62nd Congress, 3rd Session

"Mr. NORRIS. . . . It is conceded by everybody that there are some cases that arise in court where there are reasons why the evidence should be taken in secret . . . but none of these reasons exist in cases brought by the Government under the Sherman antitrust act . . ." 49 Cong. Rec. 2511.

"Mr. CLAYTON. . . . In all these matters like the shoe machinery trust case the public is interested, and in every one of these investigations, through the medium of spreading the information through the press and through the bystanders who heard it, public information has been disseminated, and in many cases the Department of Justice has had its attention called to other facts with which it was unacquainted until these public hearings. . . . Now, Mr. Speaker, the day has long since passed when we should have star-chamber proceedings, and the public has a right to know, especially in a matter like the Shoe Machinery Trust case, what is going on, because a suit of that kind is not between private parties. It is a suit in behalf of the people." 49 Cong. Rec. 2512.

"Mr. NORRIS. . . . The first reason is that unless there is some reason to the contrary, the proceedings of court should always be open to the public. If we are going to permit the decision of this court to stand . . . you will be met at the threshold of every prosecution

under the Sherman antitrust law with an application for a secret hearing. In effect, it will mean that in every case under the Sherman antitrust law the evidence shall be buried and not given to the public if we do not pass this legislation. . . . (T)he cases to which this act would apply are always cases in which the United States Government is a party commenced by the Attorney General of the United States. He represents the people of the United States, and any citizen ought to have the right to go into the court and have cognizance of the proceedings . . ." 49 Cong. Rec. 2513.

"Mr. GREEN of Iowa. Has not the public the right to know whether these officials, such as the Attorney General, are conducting these examinations properly, and how will they know unless they be made public?" 49 Cong. Rec. 4622.

"In reality the people of the country are plaintiffs in the suit, and the taking of the evidence in secret, either by the court or any master representing the court, is not only contrary to the fundamental idea of our jurisprudence, but it would often result in a denial of justice. Everything pertaining to our courts should have the greatest publicity. Secret hearings would surround our courts with a mystery of doubt and eventually bring them into disrepute. If our courts are to retain the confidence and respect of the country generally, their official conduct must be entirely free from any suspicion of star-chamber proceedings." House Report 1356, 62nd Cong., 3rd Sess., p. 2, quoted at 49 Cong. Rec. 4627.

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OCTOBER TERM, 1968

STANDARD FRUIT AND STEAMSHIP COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND UNITED FRUIT COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION OF THE UNITED STATES TO DISMISS

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 740

STANDARD FRUIT AND STEAMSHIP COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND UNITED FRUIT COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION OF THE UNITED STATES TO DISMISS

Pursuant to Rule 16(1)(a) of the Rules of this Court, the United States moves that the appeal be dismissed for lack of jurisdiction.

This appeal presents the same question as is before the Court on appellant's motion for leave to file, and petition for, a writ of mandamus, *Standard Fruit and Steamship Company* v. *Honorable Seybourn H. Lynne, et al.*, No. 788 Misc., O.T. 1968. In this appeal, as in that proceeding, appellant seeks review of a district court order (J.S. App. 15–16) denying its motion to inspect and copy documents filed in the district court by United Fruit Company pursuant to a consent de-

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cree against United in a government antitrust action. In No. 788 Misc. we urged that jurisdiction to review the district court's order lies in the court of appeals under 28 U.S.C. 1291, rather than in this Court under Section 2 of the Expediting Act (15 U.S.C. 29), since the district court's order disposed of a private controversy ancillary to the government's antitrust action. *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers, Authors and Publishers,* 375 U.S. 39, amended 375 U.S. 994; *Olympic Refining Co.* v. *Carter,* 332 F. 2d 260 (C.A. 9), certiorari denied, 379 U.S. 900. Indeed, Standard Fruit has perfected an appeal to the Court of Appeals for the Fifth Circuit (*United States of America* v. *United Fruit Company, Standard Fruit and Steamship Company,* Appellant, C.A. 5, No. 26,801) and briefs have been filed.

For the reasons stated in the government's Memorandum in Opposition in No. 788 Misc., this appeal should be dismissed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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UNITED FRUIT COMPANY
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO DISMISS OR TO AFFIRM

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IN THE

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STANDARD FRUIT AND STEAMSHIP COMPANY,
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v.

UNITED FRUIT COMPANY
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO DISMISS OR TO AFFIRM

Pursuant to Rule 16 of the rules of this Court appellee United Fruit Company ("United") moves to dismiss the appeal on the ground that it is not within the jurisdiction of this Court or, in the alternative, to affirm the order of the District Court on the ground

that it is manifest that the question presented by appellant is so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

For a statement of the background of this litigation and of the proceedings in the District Court we respectfully refer the Court to pages 1-9 of United's brief in opposition to the petition of appellee Standard Fruit and Steamship Company ("Standard") for a writ of mandamus (No. 788 Misc. October Term, 1968), which was denied by this Court on December 9, 1968.

ARGUMENT

I

The order of the District Court lacks the requisite finality and hence is not appealable under 15 U.S.C. § 29. The order denied a motion by Standard for leave to inspect detailed programs and progress reports relating to the proposed competitive activities of a new company that United is required to organize and to divest as an independent entity by the terms of a consent judgment entered in a civil antitrust case brought by the United States against United.[1] The denial was expressly made without prejudice to renewal of the motion thereafter. The order is thus interlocutory because it is not a final adjudication of the right that Standard asserts.

Standard contends that it is entitled to advance information about the competitive plans and programs of the new company (Sovereign Fruit Company, herein-

[1] Standard is not a party to this proceeding and has not sought to intervene.

after "Sovereign") so that it may protect itself against the competitive activities of Sovereign after that company is divested by United and begins independent operations.[2] Although United does not concede that any circumstances will arise that would entitle Standard as a matter of right to inspect the confidential plans and programs of Sovereign relating to its proposed competitive activity, it recognizes that the order sought to be appealed does not finally adjudicate the asserted right of Standard to see those plans and programs prior to Sovereign's divestiture and independent operation. The last clause of the order states that the purposes of the Final Judgment and the public interest will not "now" be served by granting the motion, thus explicitly recognizing that at some later stage in the divestiture proceedings the District Court may, upon application by Standard, reconsider the present denial.[3]

---

[2] In the court below Standard asserted that it "has a vital interest" in the plan for divestiture because "the final judgment herein contemplates that the New Company would provide competition against Standard as well as against defendant". (Motion, p. 2). And in this Court in its Jurisdictional Statement Standard asserts that the question presented is whether the plans and programs of Sovereign should be sealed "from access by the defendant's smaller competitors whom the decree was presumably intended to protect and benefit." (P. 4).

[3] This is recognized by the United States in its memorandum filed in the United States Court of Appeals for the Fifth Circuit supporting affirmance of the District Court's order (page 7):

> "The court's ruling, of course, represents only its view of the situation at the present time. It denied Standard Fruit's motion without prejudice to the right of Standard or of the government to make the same or a similar motion in the future. Thus should the facts warrant it, the way to necessary disclosure remains open."

Divestiture and independent operation are not now imminent. The divestiture proceeding is in only an intermediate state. United has filed the initial plan for compliance which was approved by the District Court on July 28, 1967. It has not yet filed the "detailed program showing shipping arrangements, terminal arrangements, liquid assets and other essential accessory assets that have been transferred or will be offered to the New Company prior to or contemporaneously with the distribution of its capital stock by defendant." This program need not and will not be filed by United until some time in 1969. Approval by the District Court will be required for this program. And after an order approving the program is entered it is contemplated that a period of time will elapse before the final step of divestiture occurs and independent operation by Sovereign begins. This final step will also require an order of approval by the District Court. Standard may apply either at the time of the approval of the detailed program or at the time that the final step of divestiture is submitted to the court for leave to inspect the proposed competitive plans and programs of Sovereign. In the meantime no interest of Standard can be injured because no independent competitive activity by Sovereign will occur.

Appellate review will be effective if granted at a later stage of the divestiture proceeding and no legitimate interest of Standard will be irrevocably lost if there is no appellate review at the present time. Thus the present order does not finally determine any claim of right "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the

whole case is adjudicated." See *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546.[4]

II

If it is assumed that the order is final and hence appealable under 15 U.S.C. § 29 it should be affirmed because the question presented is not sufficiently substantial to deserve plenary consideration by this Court.

In arguing that the question presented is substantial (Jurisdictional Statement, pp. 8-14) appellant repeats without change the arguments made in its Petition for Mandamus (pp. 9-14). We have responded to these arguments in United's Brief in Opposition to the Petition for Mandamus (pp. 9-14) and for that

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[4] The cases cited by Standard on page 2 of its Jurisdictional Statement involved orders essentially different from the order involved here. In Clark v. Williard, 292 U.S. 112, and Swift & Co. v. Compania Caribe, 339 U.S. 684, the judgments finally and irrevocably adjudicated asserted property rights of the appellant in circumstances in which appellate review was necessary to preserve those rights. In Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, the order by denying a petition for leave to intervene finally and irrevocably denied the exercise of a right to participate in the proceedings that had been specifically safeguarded by the terms of the consent decree entered in that case. Here Standard has not sought to intervene, and no right to participate in this proceeding was granted to Standard by the terms of the Final Judgment. In Cohen v. Beneficial Loan Corp. the order finally denied a motion that the plaintiff in a stockholders' derivative action be required, pursuant to a state statute, to give security for reasonable expenses of the defendant. The Court noted that unless the order were reviewed at the outset of the litigation the rights afforded by the state statute, if it were applicable, would be lost, probably irreparably. 337 U.S. at 546. The order in the instant case does not finally adjudicate any right of Standard and the asserted right will not be irrevocably lost if appellate review is deferred until a later stage of the proceeding.

reason we shall confine the discussion here to a brief supplementary comment.

The inherent authority of the District Court to enter an order protecting from disclosure the competitive plans and programs of Sovereign is established by decisions cited in the Brief in Opposition to the Petition for Mandamus (pp. 10-12) and is not seriously contested by Standard. It follows that the only question presented here is whether the District Court abused its discretion by refusing to give Standard access to these plans and programs. This issue turns upon the particular and peculiar facts involved. The consent decree required United to organize Sovereign, which will be smaller than either United or Standard, and to launch it as an independent competitor. Standard, whose operations and resources far exceed those of Sovereign, will be one of the principal competitors of the fledgling company. Standard seeks access to information that would enable it to impede and possibly to frustrate the competitive activities of Sovereign. Standard made no showing in the court below by way of affidavit or otherwise that access to Sovereign's plans and programs was necessary to enable Standard to compete or that failure to obtain this access would in any degree restrain or reduce competition.[5] Instead

[5] Standard's argument that it is entitled to see the plans and programs because one person has left its employment and joined the staff of Sovereign has been dealt with at pages 12-13 of our Brief in Opposition to Standard's Petition for Mandamus. It may be observed here that if Standard has any independent right to prevent persons from leaving its employment and joining the organization of Sovereign, it is free to assert that right against the persons involved or United or Sovereign in an independent proceeding in which Standard will have the full opportunity for discovery afforded by the Federal Rules of Civil Procedure. Any right of this kind is not affected in any way by the order of the District Court here involved.

Standard sought by general and abstract appeals to the public interest to obtain information to be used to promote its private ends. The court below correctly decided that the private interests of Standard had not been shown now to warrant a disclosure that might jeopardize the viability of Sovereign and thereby frustrate the statutory purposes that the consent judgment was designed to achieve.[6]

No substantial question is raised by Standard's insistence that the United States should have Standard's "expert assistance in evaluating the viability of United's plans for establishment of a new company". (Jurisdictional Statement, p. 11). The United States is in a better position than Standard to determine whether it requires assistance from Standard to carry out the purposes of the judgment. The United States has not sought review of the order denying Standard's application. On the contrary, in a memorandum in opposition to Standard's Petition for Mandamus the Solicitor General stated:

> "In addition, we submit that the issue presented —whether on the particular facts of this case the district court abused its discretion in refusing to vacate the protective order—is not of such great public importance as to warrant immediate review in this Court." (P. 4).

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[6] The District Judge, who was specially designated in 1956 to hear this case, has supervised all discovery, ruled on all motions, reviewed and entered the Final Judgment and considered and made all of the existing orders relating to the proposed divestiture. Because of his knowledge of the record and of conditions in the banana industry he was well qualified to determine whether advance disclosure of Sovereign's proposed competitive plans and programs would create problems for that company that might threaten accomplishment of the purposes of the Final Judgment.

And the memorandum filed on behalf of the United States on November 14, 1968 in the Court of Appeals for the Fifth Circuit in opposition to Standard's appeal stated:

> ". . . we conclude that the district court's order was a proper exercise of its discretion and that it should be affirmed." (P. 7).

In the face of these considered judgments by the law officers of the United States, Standard's attempt to justify its appeal by invoking considerations of the public interest does not deserve serious consideration.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or in the alternative the order entered below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 740

STANDARD FRUIT AND STEAMSHIP COMPANY,
Appellant

versus

UNITED FRUIT COMPANY
and
UNITED STATES OF AMERICA,
Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

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BRIEF OPPOSING UNITED FRUIT COMPANY'S MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING UNITED FRUIT COMPANY'S MOTION TO DISMISS OR AFFIRM

I

United Fruit Company has moved to dismiss the appeal on the ground that the order appealed from is not final but interlocutory, since it "was expressly made without prejudice to renewal of the motion thereafter".

This contention confuses finality with *res judicata*. This Court has held expressly that an order or judgment which denies the relief sought is final for purposes of appeal, even though it does not bar a renewed application for the same relief. *Wilson vs. Republic Iron Co.*, 257 US 92 (1921). Accord: *W. E. Hedger Transportation Corp. vs Ira S. Bushey & Sons*, 155 F2d 321 (CA 2-1946), cert. den., 329 US 735.

More fundamentally, the mere fact that appellant may renew its motion at a later date under changed circumstances—a right which required no reservation by the District Court—by no means guarantees that the same relief now sought will then be available.

This Court has held that the question of finality is essentially a pragmatic one looking to achievement of the "just, speedy, and inexpensive determination of every action", and that a consideration of the effects of delay and changing conditions on the rights of the parties and the public interest may be determinative. *Brown Shoe Co. vs United States*, 370 US 294, 306, 311 (1962).

Information which might at this time be invaluable to appellant in the protection of its own rights, and to the public interest in the informed implementation of consent decrees in light of the effect thereof on the defendant's industry and competitors, may be cold comfort to both if delayed until after the pattern of implementation has become fixed and irreversible.

Further, while United would make much of appellant's right to renew its motion "either at the time of the approval of the detailed program (to be filed in 1969) or at the time that the final step of divestiture is submitted to the court" (motion, p. 4), the fact is that since all these matters are secret and closed to appellant and the public, appellant has no way of knowing when any of them takes place. Nor has there been the slightest indication that the District Court would be any better disposed to grant appellant's motion after United's second detailed pro-

gram is filed in 1969 than it was after the first was filed in 1968.

II

United's motion to affirm is based on the asserted "inherent authority of the District Court" to close the record, which is stated to be (a) established by decisions cited in United's brief in opposition to mandamus, and (b) not seriously contested by appellant.

In fact, appellant's jurisdictional statement points out (footnote 1, p. 8) that the decisions cited by United involved discovery material covered by Rule 30b, FRCP, or related affidavits ordered sealed temporarily pending a hearing; and that none furnishes any authority for closure of the record of compliance with an antitrust decree.

The jurisdictional statement also points out (pp. 9, 17-18) that such a closure order is directly contrary to repeated Congressional admonitions that public antitrust cases are to be conducted in public view and not behind closed doors, and that open antitrust proceedings are particularly important when a consent decree is involved, to assure that the decree really serves the public interest, and is not merely a convenient vehicle for disposition of litigation on a volume basis.

United's statements that appellant has "sought by general and abstract appeals to the public interest to obtain information to be used to promote its private ends", and

that "the United States is in a better position than Standard to determine whether it requires assistance from Standard to carry out the purposes of the (consent) judgment" (motion, p. 7), are beside the point.

Appellant has never made any secret of its self-interested motivation in this matter. But both Congress and this Court have recognized the essentiality of such motivation on the part of interested private parties, to proper enforcement of the antitrust laws for the public benefit.

While the Government has, on this appeal, receded from its position below advocating the relief which appellant seeks, this cannot be considered conclusive of the question, since the whole purpose of Congress' open-proceedings rule, and of the statutory and judicial emphasis on the effectiveness of private interests in this field, is to make sure that the Government's enforcement function is being discharged properly.

Conclusion

This Court's decision in *Ex parte Uppercu,* 239 US. 435 (1915), evidences the gravity of a record-closure order in any judicial proceeding, contrary as such an order is to the ancient Anglo-American repugnance—enshrined constitutionally as to federal criminal proceedings in this country—toward secret trials.

Repeated, explicit expressions of Congressional repugnance for secrecy of any form in antitrust cases, at-

test the special significance of the questions raised by the closure order in the case at bar.

It is again respectfully submitted that the order appealed from is, especially under the pragmatic test endorsed by this Court, final, not interlocutory, for the purpose of this appeal; and that the questions presented by the appeal are of such substance and public moment as to justify plenary consideration, rather than disposition on motion papers.

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December, 1968

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

STANDARD FRUIT & STEAMSHIP CO. *v.* UNITED FRUIT CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 740. Decided January 20, 1969.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers, Authors and Publishers*, 375 U. S. 39.